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ACTION
OCA 87-5021

OFFICE OF CONGRESSIONAL AFFAIRS

Routing Slip

	ACTION	INFO
1. D/OCA		X
2. DD/Legislation	XXX	
3. DD/Senate Affairs		X
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O/CONGRESSIONAL AFFAIRS
87-5021

SPECIAL

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OCA FILE LEG

September 24, 1987

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer-

National Security Council - Courtney - X6534 - GF/WW (OEOB - Room #381)
Department of Commerce - Levitt - 377-3151 (04)
Department of Defense - Brick - 697-1305 (06)
U.S. Trade Representative - Parker - X3432 (23)
Central Intelligence Agency - [redacted] STAT
Department of the Treasury - Carro - 566-8523 (28)

SUBJECT: Department of State Position Papers on Mandatory Trade Sanctions for Violations of Export Controls (Toshiba/Kongsberg and Trade Bill/Export Control Documents).

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

A response to this request for your views is needed no later than **2:00, P.M., MONDAY, SEPTEMBER 28, 1987.**

Questions should be referred to Annette Rooney/Sue Thau (395-7300) the legislative analyst in this office or to Gary Moser (395-3947).

Ronald K. Peterson

RONALD K. PETERSON FOR
Assistant Director for
Legislative Reference

Enclosures

cc: Pam Turner
Lyn Withey

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ADMINISTRATION POSITION PAPER ON Mandatory Trade Sanctions For Violations Of Export Controls

- o Legislation mandating punishment in the form of trade sanctions against individuals and companies in allied countries for violation of internationally agreed export controls undermines efforts to improve those countries' control systems and leaves the U.S. open to retaliation.

- o Such punishment now will reduce support abroad for cooperation in multilateral and bilateral efforts to strengthen control systems. In addition the incentive to cooperate in enforcing controls could be weakened if the result of cooperation is likely to be the imposition of costly, foreign sanctions.

- o From a broader standpoint, making trade sanctions mandatory precludes the careful analysis and consideration of their potentially adverse impact on U.S. domestic economic, national security and foreign relations concerns. Maximum flexibility in responding to the particular circumstances of violations provides greater opportunity to get long-run progress in export controls.

- o In the propeller milling machines illegal sale case, the U.S. Government worked with the governments of Japan and Norway to strengthen their control systems. In July all COCOM governments agreed to unprecedented cooperation in improving their export control licensing and enforcement systems.

- o The actions of the governments of Japan and Norway, in particular, and the other COCOM countries, in general, to improve the COCOM multilateral export control regime are the most effective way to prevent the recurrence of illegal sales similar to the propeller milling machines case.

- o The conduct of the companies involved in this particular illegal sale is inexcusable. Japan and Norway have recognized that they did not have in place sufficient legal sanctions to punish the violators at a level consistent with the magnitude of their offenses. Accordingly, the two governments have now strengthened their national laws, revamped their licensing and enforcement systems and are participating in COCOM-wide efforts to strengthen the multilateral export control regime.

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o To indicate our concerns about the conduct of Toshiba and Kongsberg, the United States has taken certain actions under existing legal authorities, including not renewing Toshiba International Corporation's distribution license, auditing Toshiba Corporation's internal control program, providing assistance to Toshiba and Kongsberg in revamping their international control systems, and tightening U.S. Government management controls on the review of Defense contracts for which Toshiba and Kongsberg would or have competed.

o Congress will be reviewing export control enforcement mechanisms in its 1989 reauthorization of the Export Administration Act, with a view to increasing the United States ability to respond appropriately, with flexibility, to export control violations. This may well mean strengthening the United States discretionary authority to impose sanctions, if that solution is deemed appropriate.

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ADMINISTRATION
POSITION PAPER
ON
COCOM Countries' Control Standards

- Legislation under consideration in the Congress contains provisions mandating certain restrictive licensing practices by the U.S. on exports or reexports of U.S. technology to a COCOM country if the U.S. determines that it is not operating its export control system in a manner consistent with COCOM agreements.

- The provisions are found in HR 3, the Omnibus Trade Bill (Section 332(d)(1)), the Senate amendments to HR 3 (Sections 1004 and 1006(a)), S. 1656, and HR 3047 and HR 3026.

- Mandatory restriction of COCOM countries' access to U.S. technology, foreign military assistance and foreign military sales if they do not improve their systems as determined unilaterally by the U.S. is counterproductive and will undermine efforts to strengthen COCOM's role and authority as a multilateral organization for export control cooperation.

- A rigid detailing of COCOM enforcement and licensing standards and the consequences of violating them also reduces U.S. flexibility to respond to COCOM violations as appropriate and may also give some exporters a set of guidelines to follow for avoiding U.S. sanctions yet continuing to export sensitive technology to proscribed countries. It would be better to keep precise standards vague and discretion maximal, holding out the possibility of severe retributuions against violators.

- COCOM governments have made concerted efforts, now bearing fruit, over the past six years to improve the COCOM regime both multilaterally and as administered by individual governments. In addition, the U.S. is making unprecedented efforts to achieve improvements in COCOM licensing and enforcement practices.

- Making the imposition of such restrictions discretionary sends an appropriate signal without thwarting current efforts of the U.S. Government to improve COCOM.

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FACT SHEET
September 23, 1987

U.S. Government Initiatives to Encourage Strengthening of COCOM Member Export Control Systems Following Toshiba-Kongsberg Diversion

- The U.S. Government has taken major steps to strengthen and improve strategic export controls. In the 1981-85 period, the U.S. strategic trade control system was overhauled, giving it the necessary "teeth" to prevent and deter violations of U.S. export control laws, and an interagency process was developed to enforce U.S. laws and pursue more effective multilateral controls in COCOM.

- The basic enabling legislation, the Export Administration Act, was amended to provide new powers to enforce more effectively U.S. export control laws as follows:

  -- Criminal penalties for export violations were increased, with fines ranging up to five times the value of the exports or $1,000,000, whichever is greater, for companies, and up to $250,000 for individuals. Jail sentences of up to ten years in prison for each illegal transaction can also be imposed, and the statute of limitations for export control violations is five years.

  -- To deter potential diverters further by striking at the profitability of illegal export activity, proceeds from such activity are now subject to criminal forfeiture. In addition, attempting to or conspiring to violate the export control laws of the United States is now a statutory crime instead of only a regulatory violation.

  -- The Secretary of Commerce was granted the discretionary authority to deny export licenses based upon convictions. Individuals who have been convicted of crimes such as espionage may now be barred from receiving an export license for a period of up to 10 years, and Department of Commerce agents have been granted the powers to execute search warrants, carry firearms and make arrests.

- Since the Toshiba-Kongsberg diversion became known, the U.S. Government has consistently urged the Governments of Japan and Norway to take all appropriate punitive and corrective measures, and continues to be in close contact with both governments on this issue, monitoring their actions both to prosecute those involved in the diversion and to improve

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their ability to prevent and deter strategic export control violations. (See lists of Japanese government, Toshiba Corporation, and Norwegian government measures taken to date for details.)

o Recent bilateral contacts have included the following:

-- Early in June, Special Assistant to the President Robert Dean met with Prime Minister Brundtland and other Norwegian officials in Oslo, pressing for a prompt, effective response to the problems presented by the Toshiba-Kongsberg diversion. Later in June, Secretary of Defense Weinberger met with Prime Minister Nakasone in Tokyo and discussed the diversion's impact on broad U.S.-Japanese defense cooperation.

-- As a follow-up to high-level contacts in Washington, Tokyo, Oslo, and Paris, defense officials from the U.S., Japan, and Norway are meeting regularly to explore how bilateral defense cooperation can help to overcome the loss to allied submarine and antisubmarine warfare (ASW) capabilities suffered as a result of the diversion. At the end of June, the Norwegian Minister of Defense and Undersecretary of Trade met with USG officials in Washington in this regard. US-Japan Navy-to-Navy talks in Hawaii in July began a joint research effort to improve ASW capability.

-- The Japanese Minister of Trade and Industry met with Secretaries Baldrige and Shultz in Washington in July. Shortly after his visit, the Japanese Cabinet approved amendments to the foreign exchange law which were then passed by the Diet on September 4. These amendments are an important step in Japan's efforts to strengthen strategic export control enforcement.

-- A high-level delegation of Japanese export control officials visited Washington in mid-August to explain the steps their government is taking to improve its export control system. Simultaneously, a working level delegation met with U.S. officials for briefings on the US strategic trade control system and to explore adaptation of some of its aspects for use in Japan.

-- In August and September, Commerce Under Secretary Smart and Assistant Secretary Freedenberg met with MITI officials and Japanese business groups in Tokyo. Commerce's Office of Export Licensing is conducting an audit of Toshiba's compliance with requirements for renewal of its U.S. subsidiary's distribution license, and advise the company on setting up a program to ensure compliance with strategic export controls.

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-- In October, the Department of State's Senior Representative for Strategic Technology Policy Allan Wendt will lead a high-level delegation to Tokyo for talks with Japanese officials on across-the-board export control issues.

o In addition to bilateral contacts, the US has continued to pursue vigorously the implementation of COCOM principles for effective national export control systems.

o The Toshiba-Kongsberg diversion has focused international attention on the serious consequences of diversions of strategic technology to the Soviet Bloc. As a result, there is now positive momentum toward the kind of cooperation in COCOM enforcement and tightening of COCOM member national strategic export controls the U.S. advocates. Japan and Norway, in particular, demonstrated increased commitment to the COCOM process during the COCOM Special Meeting in mid-July.

o At the Special Meeting, COCOM member countries agreed to give greater attention to export licensing and enforcement.

o To supplement the multilateral COCOM process, the US will begin in October a series of high-level bilateral meetings with our COCOM partners to encourage them to review the adequacy of their national control systems and implement the principles for effective controls.

o In sum, the US is mounting a major effort -- in cooperation with our COCOM partners -- to ensure that all countries fulfill their responsibilities to COCOM.

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TOSHIBA/KONGSBERG: CHRONOLOGY OF KEY JAPANESE GOVERNMENT ACTIONS

Early April, 1987: At U.S. urging, GOJ initiates reinvestigation of Toshiba Machine Company's role in the diversion.

April 30: Japanese police raid 14 Toshiba Machine offices and residences and collect two roomfuls of evidence.

May 15: GOJ announces the following administrative measures against Toshiba Machine, C. Itoh and Co., and Wako Koeki for their role in the diversion:

- Toshiba Machine is enjoined from all commerce with 14 countries of the Soviet bloc for one year beginning May 22, 1987. Specifically, the company cannot deliver goods, provide spare parts, or service equipment in COCOM-proscribed destinations. Further, Toshiba Machine is prohibited from engaging in any kind of commercial contact with COCOM-proscribed countries during the one year period.

- C. Itoh, one of Japan's largest trading companies, is prohibited from exporting any machine tools to proscribed destinations for three months, beginning May 22, 1987.

- Wako Koeki is issued a letter of warning for its role in the diversion.

May 21: MITI forms a deputy director-general level strategic goods export council, to examine on a weekly basis applications for export of "highly strategic" goods to COCOM-proscribed countries, including high-level computers, machine tools, semi-conductor manufacturing, and nuclear energy-related equipment.

May 26: Japanese National Police arrest and charge two senior Toshiba Machine Company officials. The maximum penalty for violations of Article 70 of Japan's Foreign Trade and Exchange Control Law would be three years' imprisonment plus either one million yen or three times the value of illegal exports, whichever is higher.

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June 30: MITI announces additional measures to beef up its export review and control mechanisms, by:

- o Increasing the number of licensing officers from ten to fifteen, and the number of on-the-spot inspectors "as needed";
- o Adding about ten outside technical specialists to the Strategic Goods Export Council created May 21; and
- o Revising its Export Trade Control regulations to permit its inspectors to expand investigations by requesting reports from persons and companies other than the implicated manufacturer or exporter.

July 2: Minister Tamura, head of MITI, addressed the four principal Japanese trade and manufacturing associations, asking member firms to tighten internal controls and informing them of the new GOJ measures regarding export control review procedures.

July 10: The number of examiners in MITI's Security Export Control office is increased from 42 to 63.

July 15: PM Nakasone, in a speech to the Japanese legislature, confirms that Japan will cooperate with the U.S. in antisubmarine warfare research designed to overcome technology losses from the diversion. On the same date, MITI announces that a special inspection team headed by its Deputy Director-General will investigate all exports to the Eastern bloc to determine if there was any other wrongdoing.

July 29-31: US Navy and Japanese Maritime Self-Defense Force representatives meet in Hawaii to inaugurate the joint ASW program.

July 31: An amendment to Japan's Foreign Exchange and Trade Control Law is approved by the full Japanese Cabinet and introduced in a special session of the Japanese parliament. (See September 4.)

August 12-14: A team of Japanese export control experts met with U.S. officials in Washington for briefings on the US strategic trade control system and to explore adaptation of some of its aspects for use in Japan.

September 4: The legislative revision package introduced on July 31 becomes law. Provisions of the bill include:

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- an increase in maximum prison sentences for export control violations from three to five years, which would automatically trigger an increase in the statute of limitations to 5 years;

- an increase in maximum administrative sentences from one to three years, with provisions for illegal export of services as well as goods; and

- an interagency consultative framework.

<u>September 10</u>: Trial of accused Toshiba Machine Co. officials opens in Tokyo.

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TOSHIBA/KONGSBERG: CHRONOLOGY OF TOSHIBA CORPORATION ACTIONS

May 15, 1987: Toshiba Machine Company President resigns.

June 26: Toshiba Corporation announces that the firm's American counsel will conduct an independent investigation of Toshiba Machine's role in the diversion, and that stricter internal controls, training and review programs will be implemented to ensure compliance with export control regulations.

July 1: The chairman and chief executive officer of Toshiba Corporation, parent company of Toshiba Machine Co., resign in apology for the actions of their subsidiary. The entire management team of the subsidiary has been replaced, and Toshiba Corporation has pledged to secure the discharge of any officers or employees who knowingly participated in the diversionary activity.

July 10: Toshiba Corporation closes down the section of Toshiba Machine Co. responsible for sales to COCOM-proscribed destinations, to remain closed until effective internal export control mechanisms are in place.

September 9: Toshiba Corporation announces the results of its independent investigation, stating that there was no knowledge on the part of the parent company of the illegal activities of its subsidiary, Toshiba Machine Company. The corporation also announces institution of an internal compliance program for strategic exports, the first of its kind in Japan.

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TOSHIBA/KONGSBERG:
CHRONOLOGY OF KEY NORWEGIAN GOVERNMENT MEASURES

February 27, 1987: Norwegian Prosecutor General orders Police investigation into Kongsberg's role in the diversion.

April 28: The sales manager for Kongsberg Trading Company, the Kongsberg subsidiary which was involved in the diversion, is formally charged with providing false information to the GON licensing authorities.

April 29: GON announces that Kongsberg Trading Company, including its Moscow office, is being closed down. Kongsberg also terminates all software and hardware support activities for equipment already delivered, and halts all further trade with Warsaw Pact countries. All individuals who worked on sales to the Eastern bloc will be barred from future employment by Kongsberg. In addition, the CEO of the parent company, Kongsberg Vaapenfabrikk, has been replaced.

May: GON appoints Commission to conduct an inquiry into their internal export control practices and regulations and make recommendations for improvements.

mid-June: GON investigative team announces at a press conference that their investigation is over as of June 3. One of the eight persons under investigation has been charged. According to GON officials, the expiration of a two-year statute of limitations for export control violations on June 4 precludes the possibility of further charges; however, the individual could also be charged with falsifying official documents, for which the statute of limitations has not expired.

June 16: GON announces a new comprehensive export control law to be introduced in September 1987, which will:

- extend the statute of limitations for export control violations to ten years,
- increase maximum penalty for violations to five years' imprisonment plus fines,
- expand export controls to apply to services and technologies, transit situations, and exports to third countries, and
- provide for prosecution of all participants in export control violations, whether they be corporate entities or individuals, including accessories to the crime and those guilty of crimes of negligence.

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GON has also recommended other measures to strengthen export control administration, including:

- o random checks of internal company export control procedures,
- o increased spot checks in firms with a heavy volume of business in COCOM-controlled products,
- o the addition of five to ten export control experts to the customs service, and
- o an upgrade of the Ministry of Trade's licensing bureau, including the addition of four new licensing officers.

June 24: Additional KV documents are seized on "suspicion of illegal acts." GON reopens investigations of KV to include all Kongsberg sales to Eastern European countries since 1970.

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